

For information

**Sub-Committee on
Rules of the High Court (Amendment) Rules 2009**

**Response to issues raised at the Sub-Committee meeting
held on 9 November 2009**

Purpose

At the Sub-committee meeting held on 9 November 2009, Members requested the Administration to provide supplementary information in respect of the Rules of the High Court (Amendment) Rules 2009 (the “Amendment Rules”) for the purposes of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“the Ordinance”). This note provides the information requested by Members.

Definition of “prescribed interest” in Order 117A and provisions of the Ordinance

2. Section 28(1)(b) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that “no subsidiary legislation shall be inconsistent with the provisions of any Ordinance”.

3. Section 2(4) of the Ordinance provides that a person who has a prescribed interest in any property shall be deemed to be a person by, for or on behalf of whom the property is or was held. This section reflects the intention that for the purposes of the Ordinance, someone who has a prescribed interest in any property is to be regarded as a person who holds the property. This in effect means that the class of persons who hold the property includes the class of persons having a prescribed interest in the property.

4. Under section 20(1)(e) and the definition of “prescribed interest” in section 2(1) of the Ordinance, the scope of the class of persons having a prescribed interest in property is to be determined by rules of court. The Ordinance does not contain any express provision to restrict the power of the Rules Committee to prescribe the meaning of “prescribed interest”. The remaining question is whether there is any restriction or qualification

on the scope of that meaning which may be implied from the provisions of the Ordinance.

5. In section 17(1)(a)(ii) and (b) of the Ordinance, which provides for the classes of applicants who may make an application to the Court to revoke a specification order or a freezing notice, two classes of persons are contemplated. The first class consists of persons by, for or on behalf of whom the property concerned is held (i.e. all persons having a prescribed interest in the property are covered). The second class consists of persons in respect of whom the Court is satisfied that they are affected by the order or notice concerned (who may be a person who has no prescribed interest in the property concerned). If the scope of the definition of “prescribed interest” as given in the court rules is so wide that a distinction cannot be made between the two classes of applicants, the definition may be considered as being inconsistent with the provisions of the Ordinance. However, we consider that the existing definition allows for a distinction to be made between the two classes of applicants.

6. It is the intention of the Ordinance that a person who has a prescribed interest in property is to be regarded as a person who holds property (section 2(4)). It is also stipulated in the Ordinance that what constitutes prescribed interest is to be determined by rules of court (definition of “prescribed interest” in section 2(1) and section 20(1)(e)). As stated above, we consider that the existing definition does not contravene any possible restriction provided for in, or implied from, the provisions of the Ordinance.

The use of expedited originating summons

7. Order 117A provides that inter partes applications under sections 5(1) and 13, and applications under sections 17(1)(b), 17(4) and 18 (if there are no existing proceedings conducted under the Ordinance in respect of the person/ property concerned) are to be made by expedited originating summons. The main difference between an originating summons and an expedited originating summons is that the latter allows a hearing date to be given at the time of issue. The fixing of a hearing date early would facilitate the processing of applications before the court more expeditiously. Given the nature of the applications, i.e. to specify terrorist/terrorist associate/terrorist property (section 5(1)), to forfeit terrorist property (section 13), to revoke a freezing notice (section 17(1)(b)), to revoke or vary a licence to deal with frozen terrorist property or make funds or financial services available to a terrorist/ terrorist

associate (section 17(4)), or to obtain compensation (section 18), it is in the interests of both the applicants and respondents to have the applications processed as expeditiously as possible. We therefore consider the use of expedited originating summons appropriate.

The use of expedited originating summons in applications under sections 5, 13, 17 and 18 and the provisions of the Ordinance

8. Section 20(1)(a) provides that provisions may be made by rules of court with respect to applications under sections 5, 13, 17 or 18(“relevant applications”). Section 20(1)(c) provides that without limiting the generality of section 20(1)(a), rules of court may be made with respect to expediting, on grounds specified in the rules, the hearing of the relevant applications.

9. Since the Ordinance provides for a power to make court rules in respect of the relevant applications, the intention is that certain procedures for the relevant applications should be tailor-made and they are most likely to be different from those provided for under the Rules of the High Court (Cap. 4 sub. leg. A). Furthermore, there does not appear to be any express restriction on the power to provide for the general procedures by rules of court under section 20(1)(a) of the Ordinance.

10. We do not consider the use of expedited summons in the relevant applications inconsistent with section 20(1)(c) of the Ordinance. That section is qualified by the expression “without limiting the generality of section 20(1)(a)”. Also, section 20(1)(c), like section 20(1)(b), is an enabling provision which intends to ensure special provision could be made by the Rules Committee where it is necessary, to provide for certain expedited procedures in certain circumstances in addition to the general procedures made under section 20(1)(a).

Procedures for the Chief Executive to specify persons and property as terrorists, terrorist associates or terrorist property

11. Acting on information, Law Enforcement Agencies (LEAs) will conduct investigations with a view to ascertaining whether a person or property is a terrorist or terrorist associate or terrorist property as the case may be. As soon as there is sufficient evidence to support an application under section 5 of the Ordinance, the LEA concerned will submit the grounds for the application to Department of Justice for legal advice.

Subject to the advice of the Department of Justice, a submission will be made to the Chief Executive via the Secretary for Security to recommend a section 5 application to be made to the Court. The Chief Executive would, based on the information presented, decide whether an application should be made.

Publication of a notice of intention to make an application under sections 5(1)(a), 5(1)(b) and 13

12. The purpose of the publication is to give notice of the ex parte application to the subject person whose whereabouts are not known to the applicant. Upon having notice of the application, the subject person may, subject to directions of the Court, apply to join the proceedings. In fact, the requirement to publish a notice of application/ order/ decision/ disciplinary orders, etc. in newspapers in order to inform the subject persons or any other affected persons is very common in our legislation. For example, section 3(2)(c)(ii)(B) of the Drug Trafficking (Recovery of Proceeds) Ordinance and section 8(3)(c)(i)(B)(II) of the Organized and Serious Crimes Ordinance requires the publication of a notice of application for confiscation of proceeds of drug trafficking or crime. Further, section 37E of the Immigration Ordinance, section 34A of the Merchant Shipping Ordinance and section 52 of the Merchant Shipping (Local Vessels) Ordinance provide for the publication of notice of seizure of vessel or ships. Section 153E of the Crimes Ordinance also provides for the publication of declaration of forfeiture of vessels made by a court or magistrate.

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Security Bureau**